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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1532

FRANCIS M. COCKE, Petitioner

v.

IRWIN S. CANTOR, et al., Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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July 24, 1975

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No. 74-1532

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This is a brief in opposition to the petition of Francis M. Cocke for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered

on October 7, 1974. The brief is due July 24, 1975.

OPINION AND JUDGMENTS BELOW

Respondents agree with the Petitioner's summary of the opinion and judgments below.

JURISDICTION

Respondents agree with the Petitioner's statement of jurisdiction in this Court.

QUESTIONS PRESENTED

On page 2 Petitioner maintains the question presented to be whether his pro se complaint, predicated upon the Civil Rights Act, should have been dismissed with prejudice where the relief sought was review and vacation of state court orders which allegedly denied Petitioner due process of law, on grounds the state court lacked subject matter jurisdiction. On page 14 Petitioner states the question differently. There he says the question is whether the Civil Rights Act permits the federal court to review state court's judgments entered in violation of the Petitioner's right to due process of law.

The Respondents submit that neither proposition states the question presented. The District Court held that it had jurisdiction under the Civil Rights Act to review constitutional issues not litigated in the

state court. It examined Petitioner's alleged wrong, i.e. that the state court proceeded to judgment without "indispensable parties" and, therefore, without jurisdiction, concluding Rule 19(b) considerations were equitable, not jurisdictional. It held that the state court had jurisdiction, and by reason thereof the Petitioner's complaint failed to state a cause of action. Therefore, the question presented is whether the District Court erred in so holding.

STATEMENT OF THE CASE

The action arises out of a real estate transaction and resulting state court litigation. Respondents are practically every party, attorney and judge who were in any way involved with the case.

In 1964 Petitioner and his ex-wife made a property settlement agreement, pursuant to which a trust was established. They were divorced in 1967. Certain property held by them and the trustee was agreed to be sold in 1968 to James Stewart Company (or its nominee the Respondents Horne). Transamerica Title Insurance and Trust Company (hereinafter referred to as Transamerica) was the escrow agent. A dispute arose between the Petitioner and his ex-wife over payment instructions and after the refusal of the Petitioner to execute certain documents

the buyers brought suit for specific performance. James Stewart Co. v. Cocke, Civil No. C-222472, Maricopa Cty., Ariz. Super. Ct., filed April 22, 1969. Transamerica was joined in this action as an additional defendant by Petitioner seeking damages for the alleged mishandling of the escrow transaction. It answered and counter-claimed against Petitioner seeking attorneys' fees and costs. Thereafter it moved for summary judgment which was granted, resulting in an award of attorneys' fees. The underlying payment dispute between Petitioner and his ex-wife was litigated in post-divorce proceedings in which the court held, among other things, that the sale property had been placed outside of the trust. Cocke v. Cocke, Civil No. D-89833 (Maricopa Cty., Ariz. Super. Ct., filed December 31, 1968 and March 15, 1969), aff'd. 13 Ariz. App. 57, 474 P.2d 64 (1970).

In a series of judgments the state trial court dismissed the Petitioner's counter and cross-claims against his ex-wife and other parties in the specific performance action, James Stewart Co. v. Cocke, supra, (November 10, 1970), aff'd. sub. nom., Cocke v. Transamerica Title Insurance Co., 16 Ariz. App. 556, 494 P.2d 756 (1972), and entered judgment against Petitioner ordering the sale consummated. James Stewart Co. v. Cocke, supra, (September 27, 1972). A subsequent appeal to the Arizona Court

of Appeals was dismissed on the grounds of not being timely filed. James Stewart Co. v. Cocke, Civil No. 1-CA-CIV-2306 (Ariz. App. May 17, 1973). Following denial of Petitioner's motion for rehearing, no further state court action was taken by him. However, he refused to comply with the judgment of September 27, 1972 and Respondents James Stewart Company and the Hornes, upon application to the state trial court, obtained a writ of assistance to enforce the September 27, 1972 judgment. (Petitioner's Appendix, pp. 130-152).

Petitioner then brought this suit under the Civil Rights Act in the federal district court. The defendants below and Respondents herein filed motions to dismiss on various grounds.

The District Court dismissed the Petitioner's complaint with prejudice. The Ninth Circuit Court of Appeals affirmed the District Court's action pursuant to Respondent's motion to affirm, Cocke v. Cantor, et al., No. 74-1997 (October 7, 1974), and this petition followed.

ARGUMENTS

I

Jurisdiction is conferred upon the district court, 28 U.S.C.A. §1343, to review state court judgments entered

in violation of Petitioner's right to due process of law as protected by the Civil Rights Act. 42 U.S.C.A. §1981 et seq.

As justification for granting the writ of certiorari Petitioner asserts, pursuant to Rule 19, that the lower courts are not in accord as to whether a federal court has jurisdiction to review state court judgments entered in violation of Petitioner's right to due process of law. In support of this contention Petitioner cites Paul v. Dade County, 419 F.2d 10 (5th Cir. 1969), cert. den., 397 U.S. 1065 (1970) and Concerned Consumer's League v. O'Neill, 371 F.Supp. 644 (E.D. Wisc. 1974). Petitioner contends that the court in the Paul case, supra, found that the district court had no jurisdiction to review a state court's judgment, while the court in Concerned Consumer's League, supra, found that a federal district court did have jurisdiction to review a state court's judgment. Upon a closer examination, it is apparent that these decisions: (1) do not show a conflict between the circuits[1]; (2) do not conclude as Petitioner has sug-

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1/ Conceivably, Petitioner might have argued that the Ninth Circuit's affirmance of the District Court in this case, which held that it had jurisdiction to review the

gested; and, (3) are both distinguishable from the case at bar.

Petitioner has failed to show a conflict between the circuits as Paul v. Dade, supra, is a decision rendered by the Fifth Circuit and Concerned Consumer's League, supra, is a decision rendered by a federal court for the Eastern District of Wisconsin. 2/ Furthermore, the holding in neither case is consistent with Petitioner's interpretation. The court in Paul, supra, did not address itself to the issue of whether a federal court can review a state court judgment entered in alleged violation of due process pursuant to the Civil Rights Act. The court states that a federal district court is without jurisdiction to hear federal constitutional claims already litigated in state court where there is an appealable judgment by a state court at the time the federal suit is instituted. The court in effect held that constitutional issues sought to be raised in federal district court which

---

state court judgments allegedly rendered in violation of Petitioner's civil rights, conflicts with the Fifth Circuit's holding in Paul v. Dade, supra. However, for reasons set forth such an argument would be without merit.

2/ See Footnote 1.

were previously raised, determined and denied in a prior state action are not issues which the federal district court has jurisdiction to reconsider.

The court in Concerned Consumer's League, supra, likewise never addressed itself to the issue of a federal court's ability under the Civil Rights Act to review a state court judgment entered in alleged violation of the Petitioner's right to due process. There the court referred to the district court's ability to render a decision enjoining the enforcement of a state court's injunction. The court referred to the federal anti-injunction statute saying that actions initiated under 42 U.S.C.A. §1983 of the Civil Rights Act were excepted from that limiting statute and that the court was not restricted from prohibiting enforcement of a state court injunction.

Moreover, both of these cases are distinguishable from the case at bar. In Paul, supra, the plaintiff brought an action in a state court alleging violation of his constitutional right of freedom of religion. In a subsequent federal action, predicated on the Civil Rights Act, he attempted to relitigate the same constitutional issues. Here, Petitioner did not allege violation of his constitutional rights in the state court action. The court's holding in Paul, supra, with respect to jurisdiction of the federal district

court is, therefore, distinguishable from the instant case.

In Concerned Consumer's League, supra, the court addressed itself to the issue of whether the federal anti-injunction statute would limit the court's ability under the Civil Rights Act to prohibit enforcement of a state court injunction. Certainly the instant action does not involve a state court injunction nor the federal anti-injunction statute and is, therefore, distinguishable from Concerned Consumer's League, supra.

The decision of the District Court in the present action is fully in accord with several major decisions of this Court, which has held in the two major cases of Jones v. Mayer Co., 392 U.S. 409, 412 (1968) and Lynch v. Household Finance Corp., 405 U.S. 538, 543, 544 (1972), that the rights to due process of law and equal protection of the laws are guaranteed to any person, and that the remedy for deprivation of such rights is provided by the Civil Rights Act, Title 42 U.S.C.A. §1981, et seq., jurisdiction over the enforcement of which is given to the district court by Title 28 U.S.C.A. §1343. The court in Jones, supra, and Lynch, supra, follows its earlier decisions of Hague v. Committee for Industrial Organization, 307 U.S. 496, 507, 508 (1939) and Douglas v. City of Jeannette, 319 U.S. 157, 161, 162 (1943). In addition, all

of the circuits have referred to and appear to be in accord with these major cases.

The decision herein is not in conflict with the decisions of other circuits nor is it contrary to any decision of this Court. It is clear that the District Court had jurisdiction over any claims of Petitioner arising under the Civil Rights Act. Indeed, it so held in dismissing Petitioner's complaint which action was affirmed by the Ninth Circuit Court of Appeals.

II

The District Court did not err in finding that the state court had jurisdiction in the original litigation.

Petitioner alleges that the judgments entered by the state court violated his right to due process of law because the court had no jurisdiction over the subject matter of his case. The District Court held that the state court did have subject matter jurisdiction, but with regard to the complaint said: (Petitioner's Appendix, pp 160-161.)

> ". . . .[it] failed to demonstrate that the defendants used the courts unequally against him [Petitioner], or that the process was a sham, or that any significant right was denied him [Petitioner]

> without legal justification. It is not made clear how any one individual acted alone or in conspiracy to accomplish such a result. . . .The complaint does not state a claim under the Civil Rights Act." [Brackets supplied.]

The first page of the answer and counterclaim clearly indicates that the Petitioner himself invoked the jurisdiction of the Superior Court in June, 1969. The legal description of the real property attached to the complaint shows that the property involved in the state court litigation was located in Maricopa County, Arizona. Therefore, the Superior Court clearly had jurisdiction over the real property located in Maricopa County, which was the sole subject of Petitioner's litigation. Moreover, as pointed out in Respondent Transamerica's response herein, jurisdiction over the subject real estate escrow is likewise apparent. (Transamerica's Brief in Opposition, p 2.) It is respectfully submitted that the state court having jurisdiction over the person, the property of Petitioner, and subject matter had jurisdiction to enter the judgments which Petitioner now seeks to relitigate under the Civil Rights Act.

The substance of Petitioner's jurisdictional argument is the conten-

tion that the courts proceeded to judgment in the absence of indispensable parties. The District Court addressed itself to that issue saying:

> "It is well settled that the considerations in Rule 19(b) [F.R.C.P.] are equitable, not jurisdictional. 'To say that a court must dismiss in the absence of an indispensable party and that it cannot proceed without him puts the matter the wrong way around: a court does not know whether a particular person is indispensable until it has examined the situation to determine whether it can proceed without him.'" Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 119. [Brackets supplied.]

Petitioner's jurisdictional arguments were more specifically set forth in his complaint before the District Court. (Petitioner's Appendix, p 39-50.) These same arguments which Petitioner is attempting to relitigate, were dealt with by the Arizona Court of Appeals in Cocke v. Transamerica Title Insurance Co., 16 Ariz. App. 556, 494 P.2d 756 (1972), where the court stated:

> ". . . .[Petitioner] contends the trial court lacked juris-

diction in this matter for the following reasons:

(1) Because Transamerica's counterclaim for attorney's fees was based upon only one provision of the escrow instructions--granting the escrow agent attorney's fees--'it is elemental that a party to a contract cannot come into court seeking the enforcement of only its claimed rights under selected provisions of the contract, without regard to its obligations under the other provisions also incorporated into its pleadings, since such relief is beyond the power or jurisdiction of the court to grant.'

(2) Transamerica did not join the other party to the escrow instructions in its counterclaim for attorney's fees and such other party was 'indispenable'.

(3) Since Transamerica's counterclaim did not join the minor beneficiaries of a trust formed by Mr. and Mrs. Cocke, the trial court was without jurisdiction to proceed.

Turning to the last 'jurisdictional' argument first, as we have previously pointed out in a footnote, our decision in Cocke v. Cocke, supra, held that the interest of Mrs. Cocke in the real property involved in this sale was not subject to any trust. To argue at this late date that the beneficiaries of that trust still have an interest in the disposition of this real property and therefore are indispensable parties, not only taxes the patience of this Court but calls into serious question the advocacy of appellant's counsel.

(2) The appellant's first 'jurisdictional' ground is also without merit. There is no contention that the trial court did not obtain personal jurisdiction over appellant and appellee and that they were not properly before the Court. There is like-

wise no contention that the trial court lacked subject matter jurisdiction to determine whether Transamerica was guilty of negligence or breach of fiduciary duty in administering the escrow agreement. If we understand appellant's argument correctly, it is that if a person is a party to a contract, one provision of which allows a prevailing party attorney's fees in any litigation arising out of that contract, the party to that contract may not sue under that provision alone because to do so in some manner fails to consider all the other provisions of the contract and thus would abrogate those other provisions which the court has no jurisdiction to do. To state the proposition is to show its preposterousness. Admittedly, the trial court might err in determining that a party is entitled to attorney's fees, but 'error' and 'jurisdiction' are two wholly separate and distinct concepts, and jurisdiction is not involved in the foregoing situation.

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(2) Transamerica did not join the other party to the escrow instructions in its counterclaim for attorney's fees and such other party was 'indispenable'.

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(3) Appellant's next argument that the buyers under the escrow instructions were 'indenspensable parties' to Transamerica's counterclaim against appellant is also without merit. Transamerica's claim for attorney's fees arose out of and only out of defending appellant's alleged claim against it. It was appellant and only appellant who caused Transamerica to incur the attorney's fees claimed. In such circumstances neither the buyer nor any other party to the escrow agreement would even be proper parties to Transamerica's claim for attorney's fees, let alone indispensable parties.

For the foregoing reasons we hold the trial court had jurisdiction to determine the issues placed before it." 494 P.2d at 758.

In the case of Scott v. California Supreme Court, 426 F.2d 300 (9th Cir. 1970), the court held that where the state court had valid jurisdiction and plaintiff simply lost his case, plaintiff was absolutely precluded from collaterally attacking the judgment of the state court under the guise of the

Civil Rights Act. The Ninth Circuit has also held in Francisco Enterprises, Inc. v. Kirby, 482 F.2d 481 (9th Cir. 1973), that res judicata principals will apply to preclude parties from relitigating constitutional claims in a federal district court subsequent to an adverse judgment on the merits of such claims by a state court of competent jurisdiction.

Petitioner's jurisdictional arguments are without merit and constitute no more than an attempt to relitigate issues already decided in the state courts.

III

Petitioner's action against attorneys Kelly, Tanner and Schneider is frivolous and without merit.

The substance of Petitioner's argument to the District Court is that the Respondents acted in concert to deprive him of his constitutional right to due process. In his complaint Petitioner fails to state anything upon which a cause of action against attorneys Kelly, Tanner and Schneider could be based under the Civil Rights Act. A review of the record demonstrates that Petitioner simply attempts to relitigate issues already tried in state court. It is well settled that the assertion of a violation of Petitioner's rights and a conspiracy cannot be used as a guise to relitigage substantive issues

already adjudicated at the state court level. Francisco Enterprises, Inc. v. Kirby, supra; Morgan v. Sylvester, 125 F.Supp. 380, aff'd. 220 F.2d 758 (2nd Cir. 1955); and, French v. Corrigan, 432 F.2d 1211 (7th Cir. 1970).

Petitioner fails to allege any facts upon which a cause of action could be based under the Civil Rights Act against these attorneys. He merely mentions them as being attorneys for their respective clients.

It is well settled in federal law that activities of a private attorney, in his capacity as a representative for a client, cannot be the basis for a cause of action under the Civil Rights Act. In several cases it has been held that a court-appointed attorney in a criminal proceeding is immune from suit based on a Civil Rights Act because his acts cannot be considered performed under color of law. French v. Corrigan, supra, and Brown v. Joseph, 463 F.2d 1046 (3rd Cir. 1972). The same rationale has been used to give a court-appointed attorney immunity for his acts in representing a trustee in bankruptcy. Smallwood v. United States, 358 F.Supp. 398 (E.D. Mo. 1973). If a court-appointed attorney can be held immune from a suit under the Civil Rights Act for any activities arising out of his representation of a client it would seem even more rational that a private practitioner should be immune from the same.

Furthermore, with respect to Petitioner's allegations of conspiracy, the District Court found that:

> ". . . .reading the complaint with every intendment in its favor, it fails to demonstrate that the defendants used the courts unequally against him [Petitioner], or that the process was a sham, or that any significant right was denied him [Petitioner] without legal justification. It is not made clear how any one individual acting alone or in conspiracy to accomplish such a result. . . .the complaint does not state a claim under the Civil Rights Act." Scott v. California Supreme Court, 426 F.2d 300 (9th Cir. 1970).

CONCLUSION

For the reasons set forth above, Respondents respectively submit that the Petition for Certiorari should be denied.

Respectfully submitted,

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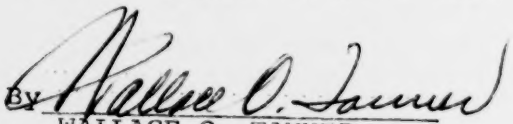
By 

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July, 1975, three copies of the Brief in Opposition to Petition for a Writ of Certiorari were mailed, postage prepaid, to the following attorneys. I further certify that all parties required to be served have been served.

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